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IN THE DISTRICT COURT IN AND FOR WAGONER COUNTY
STATE OF OKLAHOMA

CARL JAMES BAKER, for himself)
and on behalf of all others)
similarly situated,)
Plaintiff,)
VS)
COX COMMUNICATIONS, Inc.)
Defendant.)

CASE NO. CV-03-315

TRANSCRIPT OF PROCEEDINGS

HAD ON THE

21ST DAY OF DECEMBER, 2004

BEFORE THE

HONORABLE G. BRUCE SEWELL

Reported by:
NICOLE D. MARTIN, CSR, RPR
Official Court Reporter
Wagoner County Courthouse
Wagoner, Oklahoma

A P P E A R A N C E S

MR. M. DAVID RIGGS, Attorney at Law, 502 West Sixth Street, Tulsa, Oklahoma, 74119-1010, appearing on behalf of the Plaintiff.

MR. DOUGLAS A. WILSON, Attorney at Law, 502 West Sixth Street, Tulsa, Oklahoma, 74119-1010, appearing on behalf of the Plaintiff.

MR. RICHARD T. GARREN, Attorney at Law, 502 West Sixth Street, Tulsa, Oklahoma, 74119-1010, appearing on behalf of the Plaintiff.

MR. ROBERT S. GLASS, Attorney at Law, 2118 South Atlanta Place, Suite 100, Tulsa, Oklahoma, 74114, appearing on behalf of the Defendant.

MR. R. CHARLES WILKEN, Attorney at Law, 2118 South Atlanta Place, Suite 100, Tulsa, Oklahoma, 74114, appearing on behalf of the Defendant.

P R O C E E D I N G S

1 THE COURT: Let's go on the record, Case Number
2 CV-03-315, Baker versus Cox Communication. The matter comes
3 on pursuant to the countervailing Motions for Summary Judgment
4 filed by both parties. Actually, the plaintiff has filed a
5 Motion for Partial Summary Judgment. Going to be the easiest
6 way if you gentleman would go through and identify for the
7 plaintiff and then we'll have everyone for Cox announce.
8

9 MR. WILSON: Doug Wilson for the plaintiff.

10 MR. RIGGS: David Riggs for plaintiff.

11 MR. GARREN: Richard Garren for the plaintiff.

12 MR. GLASS: Judge, Robert Glass and Charles Wilken
13 for Cox.

14 THE COURT: And I thought it would benefit everyone
15 to actually call you here. I normally do Rule 4 decisions on
16 these. I will entertain some oral argument that needs to be
17 other than what you have previously set forth in your briefs.
18 I don't need and truly don't want regurgitations of what
19 you've already set forth and then I might have some questions
20 after that. So the plaintiffs got two or three minutes.

21 MR. RIGGS: Well, the plaintiffs --

22 MR. GLASS: It started with our Motion for Summary
23 Judgment and their cross motion.

24 THE COURT: Well, since they filed a motion. It
25 doesn't make any difference, whichever way. Go ahead. Yeah.

1 MR. WILKEN: Thank you, Your Honor. Your Honor, I
2 would like to read a bit of a factual summary that I think
3 will be --

4 THE COURT: I know the factual summary, so, please,
5 spare me that.

6 MR. WILKEN: Well, the factual summary, Your Honor,
7 that I referred to is evident in the CapRock case that the
8 Supreme Court just decided. When you look at that case, Your
9 Honor, if you will, it is in the materials, that factual
10 summary tracks almost identically with the factual summary in
11 this case.

12 THE COURT: That dealt with putting something
13 underneath the ground that you couldn't see it, didn't it?

14 MR. WILKEN: It does, Your Honor.

15 THE COURT: And it actually dealt with a public
16 roadway easement as opposed to a constitutional creature with
17 limited authority to do business, didn't it?

18 MR. WILKEN: It does, Your Honor.

19 THE COURT: Okay.

20 MR. WILKEN: But the cases that we cited in our
21 papers and that case tracks similarly. The question is not
22 whether the easement is public or private. The question is
23 not whether the line is under the ground or over the ground.
24 The question is does the installation of a fiberoptic cable
25 enlarge the scope of the easement, i.e., does it take

1 something from the landowner: Does it take from the piece of
2 pie that PSO already has or does it take a piece of pie of the
3 landowner?

4 THE COURT: What pie does PSO have?
5 Constitutionally what authority do they have to do business in
6 Oklahoma?

7 MR. WILKEN: PSO?

8 THE COURT: Yes.

9 MR. WILKEN: PSO has under the state constitution a
10 right to operate as a public utility.

11 THE COURT: That is electrical, right?

12 MR. WILKEN: That's right.

13 THE COURT: Is cable a public utility under their
14 authority?

15 MR. WILKEN: Cable is not a public utility under
16 that statute.

17 THE COURT: So PSO is being a lessor?

18 MR. WILKEN: PSO is -- has taken and --

19 THE COURT: Leased out.

20 MR. WILKEN: -- leased a portion of the PSO
21 easement. The PSO easement in it's construction as we laid it
22 out, and it's been laid out in plaintiff's papers as well, is
23 broad enough under the authority of CapRock and under all of
24 the authorities that we cited from across the nation, those
25 words of art that are used so often in those leases of that

1 type and that air telecommunications, telephone transmission,
2 electrical current transmission, those things although PSO is
3 not in the business of --

4 THE COURT: PSO could not become a cable company,
5 could it?

6 MR. WILKEN: Not under the current state
7 constitution, no.

8 THE COURT: But it can be a lessor leasing agent for
9 a cable company?

10 MR. WILKEN: It can, Your Honor. The question is
11 not whether PSO could transmit cable but instead whether their
12 easement in scope is broadened.

13 THE COURT: Could they lease those poles to put up
14 cellular towers?

15 MR. WILKEN: Excuse me, Your Honor?

16 THE COURT: Could they use that to put up cellular
17 operations on those towers too?

18 MR. WILKEN: So long as it did not materially
19 increase the scope of the easement. That is the question,
20 Your Honor. It is a factual question. The question before
21 the Court I would submit is, is Bogart versus CapRock
22 applicable to private easements.

23 THE COURT: How does PSO take an easement for
24 telephone and telegraph when it has no authority to operate
25 telephone and telegraph?

1 MR. WILKEN: I don't believe that is what I said,
2 Your Honor. If I did I apologize. I think PSO does have
3 under the constitution the authority to operate telephone and
4 telegraph services for it's own uses. I don't think PSO --

5 THE COURT: And I've had cases with that. I
6 actually know they can put their own fiberoptic cable and use
7 it for their own services if they were using it to monitor and
8 gauge and monitor the electrical currents, couldn't they?

9 MR. WILKEN: Right, Your Honor. And so when you
10 take the scope of their easement I think from those cases and
11 from your experience, Your Honor --

12 THE COURT: So you are saying that they derive the
13 power to do this from their power to take an easement for
14 electrical transmission services, not the part of the easement
15 that says for telephone and telegraph services?

16 MR. WILKEN: No, Your Honor. I'm saying the scope
17 of the easement allows for telephone and telegraph services,
18 i.e., it allows for that burden, whatever that is. And the
19 Pole Attachment Act, Section 224, says to PSO, you are
20 obligated under federal law --

21 THE COURT: To only if they have authority to give
22 equally to everybody, right? They can't discriminate.

23 MR. WILKEN: They can't discriminate except when it
24 becomes, one, an additional burden; or, two, a structural
25 engineering issue. So let's just say they couldn't run 15 --

1 THE COURT: What if they don't have any authority to
2 let telephone and telegraph or cable services be on their
3 poles?

4 MR. WILKEN: The authority, the only authority that
5 they have comes from the scope of their easement, Your Honor.

6 THE COURT: Okay. And you're including the scope of
7 that easement to include it when they took it for electrical
8 telephone and telegraph services, correct?

9 MR. WILKEN: That is correct, Your Honor.

10 THE COURT: Why do you think they had the authority
11 to take something that they can't constitutionally operate?

12 MR. WILKEN: Again, Your Honor, we're looking at the
13 size of the easement with regard to the burden.

14 THE COURT: And why do you think they have it? So
15 if they could go out and take an easement to build a harbor
16 along the side of the road and put a power line in it they
17 could lease it there and have a marina?

18 MR. WILKEN: If they were permitted -- just as Your
19 Honor was saying, if they were permitted for their own
20 uses to --

21 THE COURT: Can they put in a telephone operations
22 boxes along it and fill it up with that stuff too?

23 MR. WILKEN: Can they do what, Your Honor?

24 THE COURT: If they wanted a telephone substation
25 there?

1 MR. WILKEN: The question is the burden on the
2 servient tenant, Your Honor. And so long as it doesn't
3 increase the burden -- that is what our authorities say as so
4 long as --

5 THE COURT: You don't think that line laying down
6 there way lower than the rest of it is not a substantial
7 change from what the other one was?

8 MR. WILKEN: I don't, Your Honor.

9 THE COURT: You don't think people could factually
10 disagree with that?

11 MR. WILKEN: I don't, Your Honor. I think whether
12 you find for us or for the plaintiff on our Cross Motions for
13 Summary Judgment the language of the easement is either broad
14 enough to encompass or not broad enough to encompass. It is
15 not a factual issue I would submit, Your Honor. There is an
16 easement that a number of courts have said there is a space
17 that the F.C.C. says you can put wires on them. Easements are
18 construed in favor of new technology. As long as you are
19 within that space and you are stringing electrical wires you
20 are within the burden and the scope of the easement. So long
21 as you don't exceed that you are within the initial grant;
22 and, we submit that we are.

23 THE COURT: If the easement said I'm only taking
24 this easement from my constitutionally restricted abilities to
25 transmit power electrical currents do you still think you

1 could put up a private cable?

2 MR. WILKEN: I think you could. I think you could.
3 But I would point out, Your Honor, that is not what the
4 easement says. It says, "And also telephone and telegraph,"
5 which I think we've agreed they have the power to do. They
6 don't have the power to sell it, but they have the power to
7 run those lines. And I think, maybe I understood wrong, but I
8 think the Court agreed that PSO could string the same line
9 that Cox has strung at the same height that Cox has strung it
10 and still be within their easement. If that is the case, Your
11 Honor, if that is the case, then Cox has the right to do that
12 without materially increasing the burden.

13 If PSO's ability to do that is within their easement,
14 even though they are not a third-party provider, then Cox's
15 ability to do that is derived from the scope of the easement,
16 one, and their entitlement to be on the pole as a function of
17 224. And the plaintiffs have said that 224 is not applicable
18 to these poles but that is not accurate. Because they've
19 cited Paragon, Paragon versus F.C.C. which is a 1987 case,
20 that was decided before the Mandatory Access Requirement was
21 entered in 1996. And we have, if the Court would like to see
22 it, a West Law citation of that Paragon case. It is not cited
23 any time after 1993 because it is obsolete after 1996 when the
24 F.C.C. and congress promulgated rules that said there is a
25 mandatory access requirement. It is really a simple two step

1 process, Your Honor. Do we have a right to be on as the scope
2 of the easement as we've described; and, does 224 mandate our
3 access. So long as PSO could have done it themselves, Your
4 Honor, I would submit that we have the same right to do it.
5 Under federal law and the scope of the easements law.

6 THE COURT: Again, you are saying PSO could not go
7 into the cable business but if they wanted a fiberoptic cable
8 to monitor their electrical currents they could?

9 MR. WILKEN: That is correct, Your Honor.

10 THE COURT: That would be part of their electrical
11 business of monitoring the current, wouldn't it?

12 MR. WILKEN: That is part of their business, Your
13 Honor. But when we describe the scope of the easements, what
14 things can be included in this easement and not constitute an
15 additional burden on the servient tenant, that is question
16 one. If the answer to that is PSO could do that even within
17 the scope of their electrical capacity and not constitute an
18 additional burden then Section 224, the Telecommunications Act
19 in 1996, says to PSO you have to relinquish that space on your
20 pole whether you want to or not, we're going to give you a
21 fair compensation for it. The F.C.C. has said, "We
22 contemplate that this will be used in private easements."

23 The takings issue that the plaintiff has raised is a
24 takings issue that relates between PSO and Peak. The issue is
25 not between PSO and the landowner, or rather Peak and the

1 landowner, Your Honor. And that is the problem, plaintiff has
2 tied it's case to this Loretto Ogg versus Mediacom line of
3 cases, Your Honor, and they absolutely fall apart on the facts
4 here. Ogg highlights the difference between their cases and
5 the factual scenario here. Ogg is a case, Your Honor, in
6 which 224 does not apply. It is an electrical Co-Op case.
7 Ogg is a case under Missouri law. It is a prescriptive
8 easement which highlights the difference between that case.
9 Prescriptive easement, as Your Honor knows, is sort of an
10 offensive use of adverse possession.

11 Prescriptive easement is narrowly construed to the
12 purposes it was used for during the prescriptive period. This
13 is an easement in gross. And under Oklahoma law and every law
14 I don't think there is a dispute from the plaintiffs it's an
15 apportionable easement. And it is broadly construed under
16 CapRock and the other cases and Nazworthy and those cases,
17 Your Honor, to allow for advances of this technology and
18 different uses. And the problem that they have is that
19 Loretto talks about a taking without compensation for the
20 taking and it talks about taking without an easement. Those
21 are all things that the plaintiffs rely on in Ogg and in
22 Loretto.. And the Oklahoma Supreme Court specifically said in
23 CapRock, Loretto is factually distinguishable, it is very
24 narrow, and it is not applicable to these kind of situations
25 where we are talking about the scope of an easement.

1 I think it is important, Your Honor, in evaluating
2 whether CapRock is applicable to private easements to see that
3 the Supreme Court of Oklahoma has already answered two of the
4 important questions in this case: Is Loretto applicable to
5 easement cases and the Supreme Court said, "No." And the
6 Supreme Court specifically asked the question, "Does the
7 installation of fiberoptic cable constitute an unjust taking?"
8 And departing from the Loretto holding the Supreme Court said,
9 no, there is a compensation with the grant of the initial
10 easements. So long as the easement doesn't exceed the scope
11 or the installation doesn't exceed the scope of the easement
12 there is no taking from the third party. There is no taking
13 from the landowner. The taking is compensable and there is no
14 taking issued. So that leaves the only question, does the
15 installation of fiberoptic cable constitute an additional
16 burden. If it does then the plaintiffs are right. If it
17 doesn't Cox is entitled to summary judgment, Your Honor.

18 THE COURT: What is the spaces that you make
19 reference to of how tall that great big round deal is that is
20 hanging down there off the ground? Are you saying that is
21 within the lawful space? I don't remember reading that in
22 anything.

23 MR. WILKEN: Well, Your Honor, the F.C.C.
24 specifically permits storage loops and over lashing.

25 THE COURT: How high do they have to be off the

1 ground?

2 MR. WILKEN: I can't tell you what the regulation
3 is.

4 THE COURT: So you don't know whether that is too
5 low or not?

6 MR. WILKEN: I don't, Your Honor. I don't believe
7 that there is any allegation from the plaintiff. I assume --

8 THE COURT: They do it in terms of it being
9 unsightly and inconvenient to them and those problems. And I
10 kind of note living out in the country I would be worried
11 about my tractor and some of the stuff that I do as catching
12 that because it looks awful low to me. But I don't know what
13 the heights are, and evidently you don't either?

14 MR. WILKEN: I don't, Your Honor. I don't know how
15 high that is. I know obviously the line is strung within the
16 Court order that the F.C.C. permits. Your Honor,
17 the question --

18 THE COURT: I didn't see any affidavits attached to
19 that that it was strung in compliance with those. Maybe I
20 missed that as I read through it.

21 MR. WILKEN: I thought we did, Your Honor, but I
22 could be wrong.

23 THE COURT: I read them and reread them. There has
24 been a long period in between of people having -- each side
25 having time to file their responses and replies, but I don't

1 remember seeing anything of the factual issues of that of the
2 placement of it other than the plaintiffs making their
3 complaints that it is unsightly and burdensome in terms of
4 being very low to the land.

5 MR. WILKEN: I think that highlights an important
6 point, Your Honor. There is not any allegation by either
7 party that that is an issue, that the height of it is an issue
8 with regard to safety or legality under the F.C.C.
9 regulations. So I would submit, Your Honor, if they say it is
10 unsightly that may be an issue as to whether it is an
11 additional burden under the law; but, there is no allegation
12 by either side or an affidavit by either side to even put that
13 issue before the Court as to whether or not it is within the
14 F.C.C. regulations.

15 THE COURT: Well, you made that reference. As I
16 read theirs is talking about the fact that they complained
17 about it being so low and that being there as I recall reading
18 it. Although, I don't have all of them. I was going to pull
19 it up on my computer but it won't work again. Can any of the
20 plaintiffs attorneys help us on that?

21 MR. WILSON: In reference for the height alone,
22 Judge?

23 THE COURT: Yes.

24 MR. WILSON: The line itself is approximately twenty
25 feet off the ground so that the loop would be lower than

1 twenty feet.

2 THE COURT: Somewhere I remember of reading in yours
3 of complaints about that and it being lower. Am I missing
4 that? Am I miss speaking on that?

5 MR. WILSON: I don't recall that as being a fact
6 issue, Judge. I believe that there is a distinction made in
7 the brief about PSO's electric lines being strung at top of
8 the poles as they are suppose to be. They are 40 foot poles
9 and this cable line is strung half way up with this storage
10 loop in it and PSO doesn't have the right to do that. They
11 therefore don't have the right to grant someone the right to
12 do that. But the specific factual complaint about the low
13 hanging height of the storage loop I don't recall, sir.

14 THE COURT: It seems like I remember the phrase
15 unsightly or something and then --

16 MR. WILSON: Absolutely. And we have alleged that
17 it is unsightly. It is right outside Jim Baker's front
18 window.

19 THE COURT: Okay. I'm sorry. Do you have anything
20 else to add?

21 MR. WILKEN: Your Honor, we have copies of the cases
22 that I've cited to you in my argument if you would like to
23 have those.

24 THE COURT: No. I've gone through that quite some
25 time ago when you originally filed, oh, it looks like back on

1 July 6th.

2 MR. WILKEN: If I could just have a moment, Your
3 Honor?

4 THE COURT: Sure.

5 MR. WILKEN: Your Honor, I think it is important to
6 underscore our position that plaintiff has stated in his
7 papers that he's never consented to construction of the
8 maintenance of a line like this over his property and I think
9 that underscores the issue in this case. Just exactly like
10 the plaintiff in CapRock said, Plaintiff CapRock said this is
11 my private property and I never consented to have a
12 telecommunications cable on it. The Supreme Court said, as we
13 have posed in this case, no further consent is required, the
14 easement is broad enough to encompass this use. Once the
15 easement is broad enough that is what the -- the entire
16 concept of apportionability is about, Your Honor. It is to
17 allow the apportionment use by third parties of easements that
18 have already been granted so long as the easement is broad
19 enough and we would submit that it clearly is under the
20 CapRock holding. So long as that easement is broad enough no
21 consent from Mr. Baker is required.

22 THE COURT: Didn't CapRock talk about it not being
23 unduly burdensome?

24 MR. WILKEN: I don't remember that language in
25 CapRock, Your Honor.

1 THE COURT: That might be my language. Again,
2 CapRock is a roadway easement, correct?

3 MR. WILKEN: It is a roadway easement.

4 THE COURT: And as I understand that would be a
5 roadway easement that it is fenced off from the private
6 property but there is an area of land that the landowner
7 basically cannot use for anything other than, I guess, grazing
8 maybe.

9 MR. WILKEN: That may be correct.

10 THE COURT: And then there is a road in the middle
11 of it.

12 MR. WILKEN: That's right.

13 THE COURT: And this was a line that was buried
14 underneath the ground so it could never -- you would not know
15 it was there other than when it was being placed there.

16 MR. WILKEN: Right, Your Honor. I think the
17 important distinction though is that the burden, though
18 different, I would say is equal. This line in no way
19 prohibits Mr. Baker from using his property.

20 THE COURT: What about driving a tractor across it
21 loaded with round bales that you have up in the air?

22 MR. WILKEN: Well, I'll confess, Your Honor, that
23 I -- I did kind of grow up on a farm and I've never seen a
24 twenty foot tall stack of round bales. I mean, maybe there
25 are.

1 THE COURT: No. No. No. I'm talking about you
2 moving it or you moving farm equipment that sometimes is
3 certainly over the -- it doesn't look to me like that loop is
4 twenty feet tall; but, again, that is a factual fact that we
5 don't know today, do we?

6 MR. WILKEN: Right, Your Honor. And I would suggest
7 that there is no allegation by plaintiff in this case that it
8 has interfered in any way with his actual use of his property
9 as the plaintiff in Bogart specifically alleged. And the
10 easement in Bogart, Your Honor, was an easement for a road.
11 And the Court said that is broad enough in scope to allow us
12 to interpret it to include another method of transmission or
13 transportation which is this fiberoptic cable. And, Your
14 Honor, if that breach, if that construction of that highway
15 easement is broad enough to encompass the laying of fiberoptic
16 cable as a new and improved method of transmission or
17 transportation I would certainly suggest that an easement that
18 says transmission of electrical current and telephone and
19 telegraph messages is clearly broad enough also to encompass
20 fiberoptic cables. And, Your Honor, although that case does
21 not specifically refer to fiberoptic cables above the ground
22 we've cited to the Court to a number of cases, Salvaty and, I
23 think, C/R TV among others, Your Honor, that have held
24 fiberoptic cables strung above the ground do not constitute an
25 additional burden.

1 So I think, Your Honor, it all comes back to the question
2 that both sides have asked the Court to decide and we would
3 respectfully suggest that right now is the time to decide
4 this, Your Honor. We have cross Motions for Summary
5 Judgment. We would suggest that CapRock is applicable to
6 private easements. Plaintiff would suggest that CapRock is
7 not. Before we move forward to class certification and
8 discovery and extensive discovery I would suggest and
9 respectfully request the Court address this Motion of Summary
10 Judgment and grant summary judgment in favor.

11 THE COURT: Okay. Thank you. Which one of you
12 gentlemen want to respond?

13 MR. WILSON: Thank you, Judge. I know we're short
14 on time because --

15 THE COURT: No, we're not. Not for me.

16 MR. WILSON: Well, I want to accommodate the Court's
17 schedule. The Court seems well versed on the briefs and the
18 law. I won't take a long time going over those. May I
19 approach the bench, Judge?

20 THE COURT: Yes, sir.

21 MR. WILSON: I've just quickly made some notes on
22 the distinguishing characteristics of the cases just
23 referenced by the plaintiff. And as the Court points out the
24 Bogart case involves a public thoroughfare or highway. These
25 public easements, these public dedications for constructing

1 the highways are clearly distinguishable from private property
2 and a private contract. It's important, and I think right now
3 I'll just focus on an area that probably wasn't hit upon as
4 hard in the brief as it has come to me in preparing for the
5 hearing today, but it's important to know that the defendant
6 is claiming an interest in land. And by the way, Judge, the
7 fact that you were referring to earlier I believe is the
8 undisputed fact number 21 in Plaintiff's Statement of Facts
9 where it talks about the storage loop being very noticeably
10 low and unsightly.

11 THE COURT: Well, and actually refer it back to
12 Plaintiff's Reply Brief in Support of this Cross Motion for
13 Partial Summary Judgment on page two an abstract, the two step
14 approach, on the legal inadequacy makes reference to ignores
15 the additional burdens created by defendant's use and that is
16 what I have made reference to it of it being inconvenient and
17 caused problems of using the land. And I think there are some
18 other references of what you are making reference to and some
19 others on that.

20 MR. WILSON: Yes. And real quickly I would just
21 like to highlight, and I think the defendant would reiterate
22 this for me, that we're here on the legal issues. Everybody
23 agrees to the facts. So one must then ask where the defendant
24 gets it's interest in plaintiff's land. The very last fact
25 that we agree upon is Number 31 in Plaintiff's Statement of

1 Facts that the defendant's agents or employees broke onto my
2 client's property, broke the padlock in order to work on their
3 cable television line. They say they have the right to be
4 there. That is an interest in land. So where does it come
5 from? Well, the plaintiff has tendered the Pole Attachment
6 Agreement between defendant's subsidiary in Peak Cable Vision
7 and Public Service Company of Oklahoma. It is Exhibit 23 in
8 plaintiff's material. That document in evidence is that PSO
9 has never conveyed an interest in real estate to the defendant
10 to attach it's lines to it's poles. Plaintiff, as evidenced
11 by the undisputed facts, has never conveyed an interest in
12 real estate other than his predecessors in interest conveyance
13 of the one easement to PSO. But then PSO didn't convey an
14 interest in the land. So where did they get off breaking a
15 padlock and bursting onto my client's property?

16 The defendant says that by operation of the Cable Act and
17 the Pole Attachment Act it somehow enjoys a federal land grant
18 to enter upon anyone's land whether it's within the franchise
19 area or without, whether it's held publically or privately in
20 order to attach it's cable television lines to whatever pole
21 may be on that land.

22 The Cable Act, however, states that you can only hold,
23 you can only construct a cable television system if you have a
24 franchise and the franchising authority can only issue a
25 franchise within it's jurisdiction, so there is no authority

1 to construct outside the franchise. The Act itself says that
2 they can use the public rights-of-ways and easements dedicated
3 for public purposes within the franchise area.

4 When they decided to close down the head end in the City
5 of Wagoner in order to feed Wagoner subscribers with the cable
6 television signal from Muskogee that is when the necessity to
7 cross plaintiff's land arose. They followed the telephone
8 poles or the utility poles, wherever they may be, in order to
9 get where they were going. They say the Pole Attachment Act
10 gives them the right to be there.

11 Plaintiff's brief clearly points out that it's not only
12 the Paragon decision which supports the F.C.C.'s ruling that
13 the Pole Attachment Act has no applicability outside the
14 franchise area. Also the Texas Utilities' decision is a
15 reference in plaintiff's brief. And that case actually --
16 or the issues in that case actually ultimately ended up in the
17 U. S. Supreme Court which validate the Texas Utilities'
18 decision. In that decision National Cable versus Gulf Power
19 was rendered in 2002, nothing that I would call ancient.

20 May I approach the bench, Your Honor?

21 THE COURT: Sure.

22 MR. WILSON: The F.C.C. ruling which started the
23 ball rolling was indeed quite some time ago. In a case cited,
24 six F.C.C. records 7099 in the matter of Heritage Cable Vision
25 in paragraph 27 the F.C.C. rules --

1 MR. WILKEN: Are these cases that were provided in
2 the reply brief?

3 THE COURT: I don't believe that one was.

4 MR. WILKEN: I don't either, Your Honor.

5 THE COURT: And I am --

6 MR. WILSON: Well, it's the F.C.C. decision.

7 THE COURT: And that might be something you want to
8 supplement.

9 MR. WILSON: Okay.

10 THE COURT: You don't have that in any of your
11 briefing that you provided so far; is that correct?

12 MR. WILSON: It's quoted by the Texas Utilities'
13 decision.

14 THE COURT: Okay.

15 MR. WILSON: It's quoted by Gulf Powers or the Gulf
16 Power versus F.C.C. Decision. They all reference this. It's
17 nothing new. This is just where the ruling arose which they
18 then affirmed.

19 MR. WILKEN: Your Honor, I would suggest that they
20 had the last word by way of the reply.

21 THE COURT: Okay. And I am just chagrined that
22 after seven or eight years on the computer system we go on the
23 Supreme Court system and I come in here and I can't read the
24 file because it's down again and it is pulling up cases that
25 don't or images -- I see a little bit. Maybe not much more

1 on point but a little bit better because I was ready, I know
2 the pleading I wanted to pull and I can't pull it up because
3 it won't work again and I don't have time to call them and
4 have them fix it today. But we might see about you
5 supplementing, but I think it would only be appropriate that
6 he had an opportunity to actually see that even though as I
7 think I know which one that you are reciting that you have
8 made referenced on the Texas case.

9 MR. WILSON: That is fine, Your Honor. What I've
10 done is I have ripped the F.C.C. decision off the top and now
11 each one of the next cases is absolutely cited. They make
12 reference to the F.C.C. decision and I will hand defense
13 counsel a copy of the entire collection. And if I
14 may, Judge --

15 THE COURT: Okay. Yeah.

16 MR. WILSON: In Texas Utilities versus the F.C.C.
17 the the District of Columbia certain portions discusses on
18 page 10 of this particular document, but actually the original
19 document which is a F.2d document, it would be 997 F.2d at
20 pages 934 to 935. And it says: "In addition, the F.C.C.
21 interpreted the Pole Attachment Act as confirmed jurisdiction
22 over only those Pole Attachments within a cable franchise
23 service area." It noted that TCI's complaint relates only
24 theories within the scope of it's cable television franchise
25 and that in any event pole attachments outside a franchise

1 area are not covered by Section 224 and then cites Paragon.
2 And Paragon is a 1987 decision by the same court wherein they
3 rule that the F.C.C.'s interpretation of the Pole Attachment
4 Act to apply only to the area of the franchise is a reasonable
5 interpretation.

6 And if I might add just a point of the reasoning that is
7 applied in that reasonable interpretation. These statutes,
8 the Cable Act and the Pole Attachment Act are all part of the
9 Cable Act -- or, I'm sorry, the Communications Act of 1934.
10 Ever since this 70 year old Act was written I think we've been
11 amending it along the way. The statutes must be read together
12 as a whole. And the Cable Act says that when a franchise
13 authorizes the construction of a cable system within the
14 jurisdictional limits of a franchise the cable operator has
15 the right to all public right-of-ways and easements dedicated
16 for public purposes. If the Pole Attachment Act means what
17 the defendant says it means then it completely obliterates the
18 Cable Acts reference to the operator being permitted to use
19 public easements and public rights-of-ways. It is
20 unnecessary. It becomes superfluous. And, of course, the
21 construction of the statute as a whole is to be construed to
22 avoid some sort of nonsensical, superfluous result. And when
23 the F.C.C. was looking at this issue it said all the statutes
24 are read together, we've got a system set up for local control
25 of cable television franchises.

1 That local regulatory body is the body that is to oversee
2 all of these attachments. After all, when the cable operator
3 made the decision to get into that business they knew then
4 that they needed every piece of land between their head end
5 and the subscribers residence. And the Cable Act is designed
6 to get some sort of regulatory control over that land use.
7 It's a local regulatory control. It's controlled by the
8 franchising authority, and the F.C.C. interpreted the Pole
9 Attachment Act to be limited to the franchising area because
10 you cannot operate a cable system without a franchise. That
11 is the law, and specifically it states that, the law, in Title
12 47 of the United States Code, Section 541(B).

13 So they are operating -- When they made the decision to
14 close down the head end in Wagoner and run in rural Wagoner
15 County, Oklahoma where they have no authority to operate a
16 franchise, all of these facts are undisputed, when they made
17 the decision to run a line from Muskogee to Wagoner they knew
18 they had no authority to do that, they knew they were outside
19 the protection of the Pole Attachment Act. What they rely
20 upon interestingly enough is one of the undisputed facts they
21 set forth. One of their facts states, you know when you look
22 up at that line you can't tell the difference between it and a
23 telephone line or an electric line, and that is what they are
24 banking on. They can just use everybody's property wherever
25 they want to go because no one will ever know.

1 Well, the law is the law in Oklahoma protect the private
2 ownership of property, and they are violating my client's
3 rights when they enter upon his property, break his padlock,
4 bust on not only to just repair the line but they had to get
5 on his property to put it up there to begin with, no doubt
6 wants to be on there again and again, and according to their
7 interpretation the Pole Attachment Act not only opens up this
8 private piece of land under private contract to Cox
9 Communications but it opens it up to every other cable
10 television system that wants to attach.

11 They don't have that sort of a federal grant because the
12 Cable Act doesn't apply outside the franchising area, and
13 because the Pole Attachment Act doesn't apply outside the
14 franchising area so they don't have a conveyance. The law
15 doesn't give them a right to be there. If this was a Quiet
16 Title Action it would be gavel, bang, judgment for the
17 plaintiff. They've got no evidence before this Court of their
18 right to enter upon and physically occupy Jim Baker's real
19 estate.

20 In conclusion, Judge, if the law were as the defendants
21 suggest, or maybe they are advocating some sort of extension
22 of the law, that they somehow possess by operation of the law
23 the Cable and Pole Attachment Acts the right to enter upon not
24 only Jim Baker's property but anyone's property if it has got
25 a utility pole on it in order to attach their cable line then

1 to hold for defendant the Court would have to make two
2 preliminary rulings. Number one, that the authority to
3 construct the cable system under the Cable Act extends beyond
4 the jurisdiction and the franchising authority; and, number
5 two, that the F.C.C.'s interpretation of the Pole Attachment
6 Act is arbitrary and capricious and therefore undeserving of
7 deference by this Court. I think those two conclusions under
8 the law are impossible and plaintiff would ask not only that
9 Defendant's Motion for Summary Judgment be denied but that
10 Plaintiff's Motion for Partial Summary Judgment that the
11 defendant's cable line is unlawfully occupying his property be
12 granted. Thank you, Judge.

13 THE COURT: Okay. Let me ask you too, and I don't
14 remember, and, again, I can't pull up the petition since I
15 can't get in here, but, actually, the breaking the lock that
16 they had authority to do that that would still be a cause of
17 action, at least for negligence, would it not, for the damage
18 to the personal property?

19 MR. WILSON: At least for negligence if not willful
20 and intentional toward him. And that would be, Judge, to
21 reference the Court, and I mainly do this for the record
22 because I know the computer system is down, but that would be
23 plaintiff's fact, which is again undisputed as are all of the
24 facts listed by the plaintiff.

25 THE COURT: Well, really, and I think that is

1 somewhat from Cox, it has been somewhat escaped of that claim
2 it is somewhat within notice pleading but even if you have all
3 of the rights you are talking about you still can't go out
4 there and breakdown the gates and do all of that stuff, can
5 you?

6 MR. WILKEN: I don't believe that is correct, Your
7 Honor. I believe --

8 MR. WILSON: Let me get this in real quick and I'll
9 sit down. It will be paragraph 31 of the fax. I'll sit
10 down. I apologize.

11 MR. WILKEN: I don't believe that is correct, Your
12 Honor. Under Oklahoma law and as you've correctly stated it
13 has not been pled so I don't have a citation, but I do know
14 and can forward to the Court if you're entitled to access an
15 easement.

16 THE COURT: But it is reasonable access. You just
17 don't go out and break the gates, is you call and say we need
18 to get in, will you let us get in. Then if you don't then you
19 have to come to the courthouse and get authority to get a
20 restraining order to require them to open it, don't you? That
21 is how SWEPCO does it.

22 MR. WILKEN: I have to confess, Your Honor, I don't
23 have the cases to support the fact but I do think you are
24 entitled to self help on the easement.

25 THE COURT: Are you telling me that you can do self

1 help and break locks --

2 MR. WILKEN: I believe that you can.

3 THE COURT: -- without making any efforts to
4 contact the landowners?

5 MR. WILKEN: I don't think that is the record either,
6 Your Honor.

7 THE COURT: So that is another factual dispute we
8 have, isn't it?

9 MR. WILKEN: I think it is a factual dispute, Your
10 Honor, we have about a claim that is not in this case.

11 THE COURT: Oh, no. That claim has been in the case
12 from the start of their allegation. You can't read their
13 petition and understand it not to know that that is a claim.
14 It is a separate claim.

15 MR. WILKEN: Well, Your Honor, I would suggest that
16 there is probably authority. It is not certainly not in these
17 motions disputed. I believe that we can provide the Court
18 with authority that we are entitled to self help, I don't
19 think having asked first. I don't think there is any dispute
20 whether Mr. Baker had knowledge that we were seeking access
21 and intentionally locked us out. I don't think there is any
22 factual dispute by either party about that. I think in those
23 circumstances we are entitled to self help. There is a lot of
24 hypervolia about us bursting onto the property. I don't think
25 there is any allegation that we knocked a gate down.

1 THE COURT: I can tell you at least in this part of
2 the world the utility companies around here when they have a
3 problem with the landowner of getting on it they come to the
4 courthouse, kind of like we urge all citizens do rather than
5 taking the matter into your own hands and going onto
6 somebody's private property. You come to the courthouse and
7 say we're entitled to come on here and do that. I've had that
8 on several occasions, actually, SWEPCO that has something to
9 do with PSO, I believe.

10 MR. WILKEN: As you may be aware, Your Honor, in
11 this instance before resorting to self help that Cox did
12 actually get the sheriff and the sheriff of Wagoner County was
13 at the site when the lock was broken. I'm not sure whether
14 the sheriff broke it or whether Cox --

15 THE COURT: There is an interesting case about that
16 that I tried on intentional infliction of emotional distress
17 and actually got 50,000 in punitive damages of just breaking a
18 lock and going across somebody's land under the auspices that
19 you got authority so you just go do it. That is probably for
20 another day; but, like I say, there is cases around here with
21 the sheriff's department they go -- they come to the
22 courthouse and file it. And, actually, like I say, SWEPCO has
23 done that before which I think maybe owns a little bit of PSO
24 or something like that.

25 Let me come back to ask a question. If this was a

1 telephone line do you think that the telephone company with
2 their easement could have allowed Cox Cable to put it across
3 on a telephone line or do you still think that being outside
4 the franchise area would have prohibited them from doing
5 that?

6 MR. WILSON: There is a little bit of miss direction
7 in the Court's question which does not come from the Court it
8 comes from the way this argument is being framed by the
9 defendant suggesting that on the one hand the Cable Act and
10 Pole Attachment Act isn't right to be there but they don't
11 want to let go with the other hand that somehow the easement
12 to PSO gives them the right to be there. The evidence before
13 the Court is that whatever interest in the land, whatever it
14 may be, was granted to PSO. PSO did not grant any interest in
15 the land to the defendant or it's subsidiary and neither did
16 the plaintiff. They don't have any claim through the
17 easement. That is why they keep hammering it home the Pole
18 Attachment Act and the Cable Act.

19 THE COURT: Let me backup just a minute to ask of
20 that. It has been a while and I can't pull it up to look at
21 it to see, what agreements do you have with PSO to do what you
22 did?

23 MR. WILKEN: Your Honor, we have a Pole Attachment
24 Agreement with PSO and it is interesting the way this is
25 characterized. PSO provides in the Pole Attachment Agreement

1 prohibited and then sell it to somebody else?

2 MR. WILKEN: Well, Your Honor, I think obviously the
3 answer is no. But I think we've established --

4 THE COURT: They can't do telecommunications or
5 telegraphic business, can they?

6 MR. WILKEN: They can certainly for their own
7 purposes, Your Honor. They can't act as a communications
8 provider.

9 THE COURT: Only within the auspices of their
10 providing transmission of electrical service.

11 MR. WILKEN: No, Your Honor, I don't believe that is
12 the case. And I don't -- I think they are entitled to
13 provide telephone and telegraph and even, for instance, if
14 they wanted to hang a fiberoptic wire to monitor their own
15 stations they are entitled to do that; so, that puts those
16 wires within the scope of the easement. Counsel said the
17 F.C.C. has absolutely said that the Pole Attachment Act is not
18 applicable outside the franchise and despite the fact that the
19 1996 Act, I thought we stated clearly, postdated all of these
20 cases that they are talking about. Your Honor, they were
21 referring the Court to a case that is a 1993 case, citing a
22 1987 case. Congress went out with the purpose of expanding
23 this new technology, the internet, broadband service, and
24 enacted the Telecommunications Act in 1996 and said
25 specifically you have the right to attach to any and all poles

1 owned by a utility.

2 THE COURT: In a non discriminatory manner. Isn't
3 that the wording of the Act?

4 MR. WILKEN: That is right. That is right. And
5 the -- we've been cited to F.C.C. cases from a long time ago
6 that weren't in the pleadings. I would cite the Court to one
7 that is in the pleadings. That is the Cable Television
8 Association of Georgia versus Georgia Power in which the
9 F.C.C. held in it's primary jurisdiction over these kind of
10 issues that the 1996 Act provides cable providers with a right
11 to access private easements without the payment of additional
12 compensation. The Telecommunications Act in 1996 provides an
13 absolute right so long as PSO's easement is broad enough to
14 encompass the string of a fiberoptic cable for Cox to demand
15 of PSO. Although, PSO did it in an arms length agreement for
16 Cox to demand of PSO you have to give us space on that pole
17 and PSO has to do it. They are required to by federal law.
18 This idea of a franchise is a red herring because that is what
19 the 1996 Act was intended to prevent. It was intended to
20 prevent just this type of situation, Your Honor, where we have
21 an individual that wants to stand an erect a toll bridge and
22 say if you want to serve this community with this new and
23 modern technology you got to pay me five hundred thousand
24 dollars. I've got the only bridge across the river and either
25 you go through me or nobody gets service.

1 THE COURT: Okay. Well, now you are adding facts I
2 have no idea about. A bridge?

3 MR. WILKEN: Your Honor, it is a metaphor. The point
4 is he is saying if you want to come through my land with this
5 service you have to pay me extra even though I've already
6 granted, my predecessors have already granted, to PSO an
7 easement that is broad enough even though the federal
8 government has already said to PSO you have to go ahead and
9 give them space on that pole, even though most of those things
10 happen I demand to be paid again. Your Honor, that is not --

11 THE COURT: So that easement, in your opinion,
12 allows that easement space to be used for any kind of
13 telecommunications equipment?

14 MR. WILKEN: No, Your Honor. No.

15 THE COURT: Just cables?

16 MR. WILKEN: Any kind of telecommunications
17 equipment that does not constitute an additional burden on the
18 property and that is the question. And, again, Your Honor, we
19 keep circling back because I think it highlights the issue
20 that is before the Court, does CapRock apply to private
21 easements, if so is the burden increased or no, and that is a
22 question of law for the Court.

23 THE COURT: Okay. Well, from the very narrow --

24 First of all, the Summary Judgment is easily overruled on the
25 basis of the breaking of the locks and the possible property

1 damage. I am satisfied from, first of all, going back is a
2 number of SWEPCO cases, is SWEPCO has come in and acknowledged
3 in my courtrooms before that they cannot put fiberoptic cables
4 for purposes of other kind of commercial uses other than that
5 fiberoptic cable for purposes of monitoring and using it
6 within the strict confines of their electrical service. And
7 SWEPCO is a power line electrical company. Actually, I think
8 they are the owner of PSO or they were at one time or the
9 other.

10 I do not know, it is very interesting questions, but how
11 can PSO acquire more than that the constitution allows them to
12 acquire? They cannot be in the telephone or telegraph
13 business so how can they give what they don't have. And in my
14 opinion I'm satisfied that they cannot do that. The mere fact
15 that they got an easement assigned for that does not give them
16 anymore legal authority that they have by virtue of the
17 constitution. But you perhaps don't even have to reach that
18 to overrule the Summary Judgment because of the pleadings that
19 are in here and the pictures, clearly a cable that is these
20 poles when it was put up and seeing it the cable line is half
21 the distance of what the electrical lines are. And I'm
22 satisfied that reasonable minds could differ as to whether
23 that is an unduly and unreasonably burdensome impediment to
24 the landowner's land. And as is cited in the Defendant's
25 Motion for Summary Judgment in the quote, material increased

1 the burden on the appellant's property. That is an unusually
2 fact specific matter.

3 Certainly CapRock -- and it is very easy to distinguish
4 CapRock because that was something that was buried into the
5 ground so it could never be seen again and had no impediment
6 and was in a placement of a road easement where the landowner
7 is strictly prohibited from any use of that property as
8 opposed to it being basically in a more open area that this is
9 on the landowner's property. So I'm going to overrule the
10 Defendant's Motion for Summary Judgment.

11 The Plaintiff's Motion for Partial Summary Judgment and
12 it really is a -- becomes quite an unbelievable case. From
13 all of the briefs and everything I don't really see anything
14 that is close to being on all fours of fact specifics of PSO
15 being an electrical utility under the auspices of the Oklahoma
16 Constitution. And I've wrestled with that for a while; but, I
17 am satisfied when one -- if you open it up to say that PSO
18 can go out and take this easement to do telephone and
19 telegraph allows them to do just about anything they want to
20 and to go out and then lease it in a wide range of
21 possibilities. I think it is simply stretching it way too far
22 that, well, they could put up a fiberoptic cable to monitor
23 their electrical flows. And although my experience from that
24 is actually when PSO has done that, visa vi, SWEPCO, they
25 actually put their fiberoptic claim within the cables that are

1 run from one pole to the other so the fiberoptic cables never
2 actually even -- you would know no different of it being an
3 electrical line, the fiberoptic cable is buried within the
4 steel cables that run from pole to pole. But I would assume
5 they could do it outside of that, that is just a more advanced
6 stage of that. But since they can use it for their own
7 internal use then they can lease it out for cable TV seems
8 like to me to be a stretch that is simply not a reasonable
9 interpretation. So I'm going to sustain the Plaintiffs Motion

10 for Partial Summary Judgment which leaves us with some of
11 these possible issues of class action status and --

12 MR. GARREN: Your Honor, if I may speak, your ruling
13 with regard to what the defendants have already said earlier
14 we are prepared to allow you to enter an interlocutory order
15 certifying this for purposes of appeal because it is such a
16 critical issue to spend a bunch of time on all of the other
17 issues, we've all been around the class certification and the
18 things that follow.

19 THE COURT: I didn't know whether you would be, the
20 plaintiffs, would be willing to do that at all; but, that is
21 always the next point because they are extremely interesting
22 issues. I am a little bit uncomfortable with some of it
23 because I just don't really know that we have resolved some of
24 the factual issues. And maybe it is a little bitty piece, but
25 whether these lines and that loop is really pursuant to the

1 F.C.C. guidelines causes me a little bit pause for concern
2 because I don't think we actually have that fact resolved of
3 whether it has been or hasn't been. And I would sure hate for
4 it to go up and they resolve some of it but since we don't
5 know that for sure that still leaves a factual dispute.

6 MR. GARREN: We really don't believe that is a
7 pertinent or material fact with regard to the legal issues
8 that have been presented that surround the Pole Attachment Act
9 and the Cable Act from which the defendant relied upon their
10 ability to place this cable on.

11 THE COURT: Okay. It just strikes me is it came
12 back to the deal that, yeah, they can do that but if it is not
13 within the airspace or whatever they are suppose to do if you
14 all are willing to waive that that is more power to you. I
15 don't want it coming back is, well, wait a minute, we figured
16 out it is three feet too low, is you are too late.

17 MR. GARREN: I don't think we are really waiving
18 that, Judge, so much as --

19 THE COURT: Then you are not ready to certify it.

20 MR. WILSON: Well, we are willing to go forward on
21 the 31 facts that have been admitted that plaintiff is
22 submitting and the facts that the defense has submitted that
23 have been admitted. On all of those admitted facts we're
24 certainly willing to stand and certainly don't believe that a
25 legal determination on the issues before the Court is going to

1 center on whether the line height complies with F.C.C. regs or
2 not.

3 MR. GARREN: Judge, and the way this will be
4 certified, because it can't be certified on the denial of a
5 motion but it will be based upon the defendants appealing it,
6 we are agreeing that the certification issue should go up that
7 upon our motion that isn't an issue. It is not a fact that
8 creates that for purposes of further review.

9 MR. WILKEN: Your Honor, I think what the Court may
10 be suggesting and what we want to avoid as well is it goes up,
11 the Court says -- the Supreme Court says Judge Sewell got it
12 wrong, that is not unduly burdensome on your property, and
13 then the plaintiff comes forward and says, well, we just found
14 out today that it is six inches lower than the F.C.C. allows
15 so now we believe we should reassert that now.

16 THE COURT: You are precisely correct on that.
17 Maybe not on the other but on this you are precisely correct.

18 MR. WILSON: It is not could a fact that either
19 party has tendered other than obviously the visual evidence by
20 way of the photograph. We've not measured it but we would be
21 willing for purposes of getting the question certified.

22 MR. WILKEN: If they are willing to be estopped from
23 bringing that argument.

24 THE COURT: That is what I suggested. They didn't
25 want to do that. So we really need to perhaps pass it to

1 another day because when I read it, like I say, I can't pull
2 it up to do it, but it appeared like to me that the plaintiffs
3 made sufficient allegations of the problems they saw with it
4 and the heights one way or the other. And I perhaps missed it
5 because I just don't remember anything in Cox's replies to the
6 deal certifying that we have this within the limits of the
7 F.C.C. guidelines on height. Maybe it is in there, I'm not
8 for sure. And if it is they maybe need to confirm that it is
9 because, yeah, I don't want it coming back on that. This is
10 an extremely interesting case and it could certainly come back
11 that I could be wrong on that.

12 MR. RIGGS: Your Honor, this issue that would be
13 certified would be your sustaining of our Motion for Summary
14 Judgment. The issue you put your finger on is whether or not
15 it is a burden of the land would only come up if you were
16 certifying the question with regard to their Motion for
17 Summary Judgment which you have denied.

18 THE COURT: But if it comes back is what he says,
19 and I'm trying to think through this, and they say, no, the
20 Supreme Court says one of those Acts it does apply and
21 therefore you lose, then he's saying you come back and say,
22 well, wait a minute you didn't comply with it because it is
23 too low so we still have a claim here.

24 MR. WILSON: That issue wouldn't be before the
25 Court. Why should we have to agree to be estopped today when

1 that is not going to be before the Supreme Court at all? That
2 issue would still be within this Court's control.

3 THE COURT: Because if they say that it comes within
4 the Act I want the case to be over. I don't want it to come
5 back and it to be resurrected on that theory. And if you all
6 want to waive that theory that is fine, otherwise, I
7 want the --

8 MR. GARREN: It is not a pled theory though, Judge.
9 I don't know if that is where the distinction is
10 made. That's --

11 THE COURT: Then you've waived it.

12 MR. GARREN: That theory has not been pled for
13 purposes of this motion.

14 THE COURT: Well, we have notice pleading.

15 MR. GARREN: Well, for a Summary Judgment you have
16 to go on the basis of the facts; and, Judge, all you are going
17 to do is submit those briefs just as we submitted them to you
18 to the Supreme Court.

19 THE COURT: You know, I've got to think through it
20 but it is very possible they could find that those Acts don't
21 apply but that the easement does apply and that PSO had the
22 authority to give this easement and then we would come back on
23 the issue of whether it was unduly burdensome or not and back
24 to the issue of whether it is too low or not.

25 MR. GARREN: Then there is no problem with doing

1 that then. Then that issue remains for that purpose. That is
2 exactly what -- if you walk it through that way, we don't
3 believe that is the way it is going to happen, but if you walk
4 it through that way that issue will still remain because it is
5 not an issue that is going up with our motion which has been
6 sustained and there will be other issues obviously.

7 THE COURT: I kind of want to know whether you are
8 going to dispute that or not.

9 MR. GARREN: Well, since ours is a Motion for
10 Partial Summary Judgment that has not been the facts that are
11 being pled or relied on for purposes of our Partial Summary
12 Judgment and all we're trying to do, Judge, is say that if
13 this was certified that the main issue --

14 THE COURT: When I read it, and maybe you didn't
15 read it, but when I read it when you talk about it being
16 burdensome to you and causing problems to you that that
17 was -- the only way it could be burdensome and cause problems
18 to you is because it is too low and it is unsightly.

19 MR. GARREN: No. It could be burdensome to us
20 because it is occupying wrongfully our land.

21 THE COURT: Well, you talked about it being
22 unsightly out the front window. And I wish I could pull up
23 the computer. But your briefs were way further than just
24 saying by virtue it is there it is burdensome.

25 MR. WILSON: Judge, to get there there has to be

1 some conceptual thought that somehow or another just
2 compensation is there for my client because of this. However,
3 under the Oklahoma Constitution because it's private property
4 and because my client does not consent it is not an issue of
5 compensation for the unsightliness of it, it is an issue of
6 get your line off my land.

7 THE COURT: It might be if they say that that
8 easement does allow it to be there. It might be and say if
9 that is an easement that is within the F.C.C. guidelines that
10 it is within the legal definition not unduly burdensome, but
11 if it is outside the legal requirements of it it would be.

12 MR. RIGGS: Your Honor, just because you've
13 identified that as you have as a fact perhaps in dispute that
14 could be resolved at trial. What we're asking the Court to
15 certify is a question that doesn't require the Supreme Court
16 to address that question at all. And if the Supreme Court
17 does address that question there is no reason we should have
18 to waive that issue. We should still have a right to try that
19 factual dispute which you have yourself identified. We're
20 just asking the Supreme Court to rule on the issues that they
21 have agreed are not in dispute and apply the law.

22 THE COURT: In essence your issues are their issues
23 just in reverse presentation.

24 MR. WILKEN: That's right. And that is why, Your
25 Honor, I believe in addition to take their motion up we're

1 entitled to certify the denial. It is not an interlocutory
2 order that --

3 MR. GARREN: You can't because the statute doesn't
4 provide it on the denial of a motion. The statute is
5 specifically to that. That is under Rule 1.50. Under
6 Oklahoma Supreme Court rules which says no certified
7 interlocutory order shall not be considered taking from an
8 order overruling a Motion for Summary Judgment.

9 MR. RIGGS: That isn't going up.

10 MR. GARREN: So that isn't going up. The only thing
11 going up is the sustaining of our motion.

12 THE COURT: Your motion contains the same legal
13 issues that their motion does.

14 MR. GLASS: You are absolutely right, Judge. If the
15 goal of going up --

16 THE COURT: It is going up. They are going to argue
17 that it should not be sustained because they are right.

18 MR. GARREN: But you are now talking about legal
19 issues and not a fact issue which is where the line may be
20 three feet below because of a loop which really isn't
21 tantamount or paramount to any of the legal supporting issues
22 that allows you to grant the motion and that is our point.

23 THE COURT: I don't agree with you at all. But
24 evidently you all didn't -- you know -- you talked about it
25 in your briefs. And it is maybe because I've done lots of

1 condemnations but it stuck out to me that that could become a
2 fact issue. But it might very well be if the F.C.C. or
3 someone says that they can have it within that airspace.

4 MR. GARREN: The Supreme Court could also say this,
5 Your Honor, upon reviewing it and even though you've brought
6 it up they can simply say that is not a material fact that has
7 any basis for us making our decision --

8 THE COURT: They might.

9 MR. GARREN: -- and sustain your ruling.

10 MR. WILSON: Judge, if it would be of any assistance
11 to the Court I have a paper copy of both cross motion.

12 THE COURT: Let me look at that for a minute I
13 guess. And although we're really now wasting all of these
14 other peoples' time because I'm kind of astounded that you
15 gentleman wouldn't want to have that issue of those facts in
16 there that went through all of these other facts that we
17 wouldn't have those. I really think that is the one I want.

18 MR. WILSON: These are all four briefs.

19 THE COURT: Well, I'm just going to do it this way,
20 if the -- No. That won't work. I'm not going to be very
21 receptive if this case comes back and you all want to add that
22 back in as a claim. Send me what you are going to propose as
23 an order for certification and then we'll see.

24 MR. WILKEN: Your Honor, could I just ask a quick
25 question to make sure I understood. Did you say in your

1 ruling that you did not believe PSO was a utility under the
2 state constitution?

3 THE COURT: No. No. As I understand I think I
4 asked you early on there are utilities that are restricted to
5 providing electrical service; and, like I say, they don't
6 provide telephone and telegraph services. If it sounded like
7 I said that I sure didn't. That is why I'm saying that they
8 don't have the authority to take an easement to do business in
9 an area that they can't do business in.

10 MR. WILKEN: That is why I was clarifying, Your
11 Honor.

12 MR. WILSON: Judge, solely for purposes of
13 clarification of the record, when the Court grants Plaintiff's
14 Motion for Partial Summary Judgment does the Court mean that
15 it's ruling is that the cable TV line at issue unlawfully
16 occupies plaintiff's property?

17 THE COURT: Yes. By virtue of the fact that PSO as
18 a constitutionally created utility entity does not have
19 authority to take easements for telecommunications lines and
20 therefore had nothing to pass onto anyone else.

21 MR. WILSON: Thank you, Judge.

22 THE COURT: And that takes it out of those Acts
23 because that is a non discriminatory manner. If they don't
24 have any authority to do it they can't give it to somebody
25 else. So I don't really have to reach -- I don't think you

1 really have to reach the issue of whether it is outside their
2 franchise area or not, PSO could not do what they did. And
3 that is why they probably did that good lawyering to sign that
4 agreement essentially saying we're giving you what you got,
5 what we've got if anything, and that is up to you all to take
6 your chances on it of whether we do or don't.

7 MR. GLASS: Judge, they've agreed to allow it to be
8 certified to go up and you are waiting for what?

9 MR. RIGGS: We'll submit an order.

10 MR. GLASS: Our offices will work together to submit
11 you an order to take it up.

12 THE COURT: Submit an order. I still would like you
13 all to think about it because it should not be very hard to
14 add another fact within all of these facts that you did that
15 the line is actually placed within the parameters of the
16 F.C.C. requirements or it isn't.

17 MR. WILSON: Yes, sir.

18 THE COURT: Thank you all very much. We'll go off
19 the record.

20 (Proceedings concluded.)

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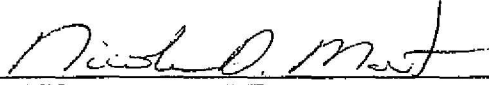
C E R T I F I C A T E

STATE OF OKLAHOMA)
) ss.
WAGONER COUNTY)

I, Nicole D. Martin, a Registered Professional Reporter in and for the State of Oklahoma, do hereby certify that this is a true and correct record of the proceedings held in Case Number CV-03-315 on the 21st day of December, 2004, before the Honorable G. Bruce Sewell, at the Wagoner County Courthouse in the City of Wagoner, State of Oklahoma.

I further certify that I am not related to nor attorney for any party, and that I am not interested in the result of said cause.

WITNESS MY HAND AND SEAL this 27th day of December, 2004.



NICOLE D. MARTIN, CSR, RPR
Official Court Reporter
CSR# 01368